Supreme Court, U.S.
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NO. 92 - 206

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

v.

BRADLEY ALAN PURDY, D.L. and J.L.,
and D.L. as Guardian ad Litem
of C.L. and A.L., Minors,

Petitioners.

Petition for Writ of Certiorari to
the Supreme Court of South Dakota

APPENDIX TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY, DAVID
LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
CIRCUIT COURT JUDGE PRESIDING

APPELLANT'S BRIEF

NOTICE OF APPEAL FILED APRIL 18, 1991

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The exact dates of the sexual contacts are not well defined. In Purdy's deposition testimony, he claimed that the contacts occurred in 1983 and 1985; the Lerbacks claim they occurred between 1982 and 1986. There is also a discrepancy in the number of such incidents. Plaintiffs initially claimed there had been more than 40 such incidents; at trial, Richard Lerback testified there were 10 to 15 contacts with Andrew, 5 or 6 with Christian. (T.9) These details are neither important nor necessary to the determination of this action, though.

During those periods of time, Bradley Purdy was attending college at Brigham Young University in Provo, Utah; and he also did a church ministry in Germany for a period of time. During those periods of time, he considered

himself to be a resident of his parents' household. Pursuant to the definition of an "insured" under the policy, there is no question Bradley Purdy meets the definition of an insured under the homeowner's policy of his parents. Consequently, that is not an issue in this appeal.

Bradley Purdy's birthdate is February 8, 1964. (Purdy P.53, L.1.) In the summer of 1982, which is when the Lerbacks claim the contacts first occurred, he was a recent high school graduate, 18 years old. The Lerbacks had moved to Rapid City in the spring of 1982. After helping the Lerbacks move in, the Purdy family became good friends of the Lerback family. Over the next few years, Bradley Purdy frequently watched the Lerback children. Up to the time the Lerback parents were told of the sexual contact, they thought highly

of Bradley Purdy, and even referred to him as their adopted son.

Andrew Lerback's birthdate is December 27, 1978. According to Andrew's trial testimony, Purdy had sexual contact with him approximately 15 times between 1982 and 1986. (Andrew P. 8, L. 15) The first act of sexual contact with Andrew involved Purdy's closing the door of a room, sitting with his back to the door with Andrew seated between Purdy's legs, during which time Purdy undid Andrew's pants and rubbed Andrew's penis for about 10 minutes. After this initial incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No." Immediately following this initial incident of sexual contact with Andrew, Purdy told Andrew he better not tell his parents. (Andrew P. 4)

Several weeks after the first

incident of sexual contact with Andrew, while in a car in the Safeway parking lot in Rapid City, South Dakota, Purdy undid Andrew's pants and again rubbed Andrew's penis for about 10 minutes. After this second incident of sexual contact in the Safeway parking lot, Purdy asked Andrew if it felt good, to which Andrew again replied "No." Immediately following this second incident of sexual contact with Andrew, Purdy asked Andrew if he was going to tell his parents, to which Andrew replied "No." (Andrew PP. 5-6)

On a later occasion, Purdy followed Andrew to Andrew's bedroom, Purdy shut the door, sat on the floor with his (Purdy's) back to the door, sat with his legs spread apart, and told Andrew to undo his (Andrew's) pants and sit between Purdy's legs again. On this third described incident of sexual

contact, Purdy rubbed Andrew's penis for about 10 minutes again. Immediately following this third described incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No it doesn't." (Andrew PP. 6-7)

On a fourth described incident of sexual contact with Andrew, Purdy took Andrew into Christian's room, closed the door, sat up against the door with his legs spread apart, and told Andrew to undo his (Andrew's) pants and sit between Purdy's legs again. On this fourth described incident of sexual contact, Purdy again rubbed Andrew's penis for about 10 minutes. After this fourth described incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No." Immediately following this fourth described incident of sexual contact, Purdy and Andrew heard Christian coming

downstairs to the room, and they also heard Mrs. Lerback pulling into the driveway. After hearing other members of the Lerback family arriving, Purdy grabbed the collar of Andrew's neck, pulled him back around and said "You better not tell your parents." (Andrew PP. 8-10)

During the times the sexual contacts with Andrew were going on, the acts occurred on approximately a weekly basis. (Andrew P. 8, L. 18) Purdy had other incidents of sexual contact with Andrew, totalling approximately 15, but details of these other contacts were not described by Andrew. (Andrew P. 8, L. 15)

Purdy had at least three incidents of sexual contact with Christian. On the first incident of sexual contact with Christian, Purdy took Christian to an upstairs bedroom and stood up on the

bed. Purdy then asked Christian if he trusted him (Purdy) to which Christian said yes. Purdy then told Christian to take down his pants, and that if Christian trusted Purdy, he would do it. Christian took down his pants, and Purdy rubbed Christian's penis for approximately five minutes. Following the first incident of sexual contact with Christian, after telling Christian he could put his pants back on, Purdy let Christian pick out a coin from Purdy's coin collection, as a reward for Christian's participation in the act. Following this first incident of sexual contact with Christian, Purdy told Christian "If you trust me, you won't tell your parents." (Christian P. 6)

On the second described incident of sexual contact with Christian, Purdy took Christian to a bedroom, laid Christian on the bed, told Christian to

take off his swimming shorts, and gave Christian a copy of Playboy Magazine. This second described incident of sexual contact took place during the summer of 1982, prior to Christian's ninth birthday. During the second described incident of sexual contact with Christian, Purdy masturbated Christian. Immediately following the second described incident of sexual contact with Christian, Purdy asked Christian if he was okay, to which Christian replied "Yes." (Christian PP. 7-8)

The third incident of sexual contact with Christian occurred during the summer of 1983. On this occasion, after some other boys had left, Purdy took Christian to a room, locked the door, stood Christian up on a chair, and told Christian to pull down his (Christian's) shorts. On this third incident of sexual contact with

Christian, Purdy began rubbing Christian's penis, and told Christian to go ahead and let it get hard. Christian responded "No" to Purdy's direction to "let it get hard." On this third described incident of sexual contact with Christian, Purdy then told Christian to "do it for me," to which Christian refused. (Christian P. 10)

Purdy was an intelligent young man. He graduated from high school in 1982 with honors, with approximately a 3.4 grade point average. (Purdy P. 55, L. 3-4) During his freshman year at Brigham Young University, Purdy had a grade point average in the 3.2 - 3.3 range. (Purdy P. 55, L. 12-13)

Purdy had been a victim of sexual contact himself, when he had been a young boy. (Purdy P. 37) Purdy's prior sexual victimization occurred when he was 10 to 11 years old, involved another

male approximately 16 years old, and involved 5 to 10 incidents over a four to five month period. (Purdy P. 55, L. 21 - P. 56. L. 7) Following his own victimization, the incidents had been on Purdy's mind a great deal. (Purdy P. 57, L. 5) His prior victimization caused him considerable mental pain over the years. (Purdy P. 57, L. 8) His prior victimization caused him guilt, and considerable fear, shame and embarrassment. (Purdy P. 38, L. 11; P. 57, L. 10; P. 60, L. 1; P. 59, L. 21; and P. 60, L. 3 and 5-7) While he considered himself fortunate to have come from a very good home, with very good parents, a home in which sexual matters could be discussed openly, he could never bring himself to tell his parents that he had been the victim of sexual abuse as a child. It was just too terrible a subject to discuss.

(Purdy PP. 55-61)

When initiating sexual contact with Andrew and Christian, Purdy had thought about his own prior victimization. (Purdy P. 61, L. 7) Following each act of sexual contact with the Lerback boys, Purdy thought about it. (Purdy P. 82, L. 7) Following each act of sexual contact with the Lerback boys, Purdy told himself he wouldn't do it again. (Purdy P. 82, L. 9) Following each act of sexual contact with the Lerback boys, Purdy told himself he shouldn't do it again. (Purdy P. 82, L. 11) Purdy recognized no good could result from the sexual contacts with the Lerback boys, either for himself or for the boys. (Purdy P. 82, L. 15)

During the time Purdy was engaging in sexual contact with the Lerback boys, he gave no thought to the fact that he might be an insured under his parents'

homeowner's insurance policy. (Purdy P. 53, L. 13, 18)

American Family twice brought Motions for Summary Judgment on the coverage question. The first Motion for Summary Judgment was served and filed October 19, 1988. After lengthy delays, the case was argued March 12, 1990. A Memorandum Opinion issued May 1, 1990, (Index 372, App. 6) followed by an Order Denying Summary Judgment entered on May 11, 1990.

Following additional discovery, American Family made a Motion to set aside the previous Order Denying Motion for Summary Judgment, or in the Alternative, Motion for Summary Judgment, on December 3, 1990. That second Motion was denied January 15, 1991.

Following a trial to the Court on January 25, 1991, the Trial Court

entered Findings of Fact and Conclusions of Law, and a final Judgment. The Judgment was entered and filed March 11, 1991. The Judgment found Bradley Purdy neither expected nor intended injury to result to the Lerback children, because of the sexual contacts, and as a result, American Family has a duty to defend and indemnify Purdy in the Lerback action.

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B. THE TRIAL COURT'S RELIANCE ON THE PSYCHOLOGICAL TESTIMONY, AND ITS RESULTING FINDINGS OF FACT AND CONCLUSIONS OF LAW, ARE CLEARLY ERRONEOUS.

The evidence produced by Plaintiffs in the form of testimony from Dr. Fred McCall-Perez is unworthy of belief. To borrow the characterization of the proffered psychiatric testimony in J.C. Penney v. M.K., supra (page 20 of this Brief, infra), his testimony was "inherently incredible." McCall-Perez was a $1,000.00 a day expert from Miami, Florida, who in January of 1990, 15 months after American Family's Motion for Summary Judgment was served and filed, executed an Affidavit (Index 272, App. 7) expressing an opinion that Purdy did not intend to cause harm, but rather acted out for purely sexual

gratification, and would convince himself the sexual contact was "a form of love and friendship." His trial testimony followed a similar vein.

Of course, such arguments have been rejected by other courts, and this Court should likewise repeat such a ridiculous conclusion. We should analyze the substance of McCall-Perez' testimony, though. He formed his opinions following review of a Minnesota Multiphasic Personality Inventory (MMPI) done on Purdy in August of 1989, more than three years after the last of the sexual contacts. He also reviewed other documents related to the criminal proceedings. He did not interview Purdy, either prior to executing the Affidavit submitted in opposition to the Motion for Summary Judgment, or prior to testifying at trial. McCall-Perez did not interview either Christian or Andrew

Lerback, either, not before execution of the Affidavit or before testifying at trial. McCall-Perez agreed this was the first time he had ever testified in litigation without interviewing either the victim and/or the perpetrator (T. P. 35, L. 14-18).

His Affidavit, of course, is couched solely in terms of intention, not expectation. At trial, McCall-Perez admitted expectation is not a term with which he is familiar. (T. P. 39, L. 1-16) He admitted an MMPI is not directed to expectation of harm in a sexual contact situation. (T. P. 29, L. 17-19) He admitted an MMPI has no correlation to motivation for sexual contact. (T. P. 32, L. 25 - T. P. 33, L. 7)

He admits there is no literature substantiating the idea that a perpetrator of sexual contact does not at least expect the consequences of his

acts. (T. P. 40, L. 24) Although he has testified in a number of sexual contact cases, always for the victim (T. P. 35, L. 9), he admits he has never before testified on this issue. (T. P. 47, L. 7-12) Despite his range of expertise and involvement, he has no opinion whether sexual contacts with children, such as that engaged in by Bradley Purdy, should be criminal offenses. (T. P. 41, L. 13) This despite the fact that in his opinion, at least 90% of children exposed to sexual contacts such as these do suffer adverse affects. (T. P. 41, L. 14-21; T. P. 43, L. 10-13)

In addition to never having testified on this issue before, he also admits he has never recommended to any legislative body that acts such as these should not be treated as criminal. (T. P. 47, L. 18-21) He is also unaware of

any recognized body within the psychiatric or psychological field that has made any recommendation to a legislative body, to de-criminalize such conduct. (T. P. 47, L. 22 - T. P. 48, L. 5)

Both McCall-Perez and the Trial Court seem to have equated the concept of intention with expectation. Once again, at the risk of too much repetition, we again state our position that the nature of these acts is such that an intention to cause injury should be inferred. Nonetheless, McCall-Perez' Affidavit and trial testimony clearly show he is talking about intention in the strict sense. He admits to equating expectation with intent. (T. P. 31, L. 9-13) On the intention issue, the Trial Court in its decision, twice limited its holding to the very narrow sphere of intention. (Court's Decision,

Separate Index, P. 7, L. 17; and P. 6, L. 13) At the very least, there must be an expectation of harm or injury from sexual contacts such as those perpetrated by Bradley Purdy.

American Family called Dr. Michael J. McGrath, a clinical psychologist from Sioux Falls. McGrath testified, candidly we believe, that there is no way to get inside someone's head, particularly to go back several years as McCall-Perez claims he did, to figure out one's expectation or intent. Nonetheless, McGrath took serious issue with McCall-Perez' testimony. First, he did not believe the MMPI, out of date as it was, was relevant to determine Bradley Purdy's state of mind several years prior when he was molesting the Lerback boys. (T. P. 63)

McGrath also believes there were factors that would lead to a conclusion

that Purdy did at least expect injury or adverse consequences. First was Purdy's own prior victimization. Second, Purdy's intelligence was a factor dictating in favor of expectation. Third is the number of acts involved. Finally, protest of one of the boys is yet another factor. T. P. 66-67).

Interestingly, although McCall-Perez generally agreed that an expression of concern, phrased exactly as Purdy did to one of the boys: "Are you okay," was evidence of some expectation of harm, McCall-Perez initially did not recall that testimony. (T. P. 51, L. 25) Once that was pointed out to him, he still testified he found nothing in Purdy's testimony that led him to conclude Purdy might have expected harm to be resulting. (T. P. 49, L. 5; T. P. 52, L. 10) McCall-Perez' testimony is, quite simply

stated, unworthy of belief. Should this Court not decide this issue as a matter of law, as 24 of 25 current jurisdictions have, this Court should view the real objective facts here, and determine at the very least, that Bradley Purdy had an expectation of injury from his acts of sexual contact with the Lerback boys.

The Findings of Fact and Conclusions of Law proposed by American Family were rejected in their entirety by the Trial Court, despite the fact that we rather painstakingly set forth the very precise facts relating to the sexual contacts as testified to by Christian and Andrew. We included with the Findings of Fact and Conclusions of Law an Index showing the specific pages and line numbers of Purdy's deposition testimony, and Christian and Andrew's trial testimony. Those Findings of Fact and Conclusions

of Law as proposed by American Family should have been entered, and based thereon, at least an expection of injury should have been found. Relying as they do on McCall-Perez' "inherently incredible" testimony, they are clearly erroneous.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY, DAVID
LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
CIRCUIT COURT JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

NOTICE OF APPEAL FILED APRIL 18, 1991

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II. The Trial Court's Findings of Fact and Conclusions of Law are clearly erroneous.

A. The Findings and Conclusions are unsupported by the evidence.

The Court entered 11 Findings of Fact (Index 508; Appendix 2). American Family proposed 66 Findings of Fact (Index 491; Appendix 3), along with an Index to proposed Findings of Fact (Index 500; Appendix 4). The Index referred to specific pages and lines of trial testimony of the Lerback boys, Plaintiff's expert, and Bradley Purdy. Particularly with reference to details of the sexual contacts with the boys, American Family's proposed Findings and the Index thereto detail the true objective facts surrounding the acts of sexual contact. Nonetheless, the Trial Court rejected those proposed Findings, and adopted only the conclusory Findings

proposed by the Lerbacks. Those Findings are clearly erroneous, and the rejection of American Family's proposed Findings is likewise clearly erroneous, as they are based on either uncontradicted evidence, or on the evidence submitted by the Lerbacks or by Purdy.

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C. The testimony of Dr. Fred McCall-Perez, Lerbacks' expert, is unworthy of belief.

In the Lerbacks' Brief, McCall-Perez is painted as the only person who can see the real truth here, and that real truth is that Bradley Purdy did not expect adverse consequences to result to the Lerback boys, from these repeated acts of sexual molestation. Their Brief argues that the other 24 courts have been blinded by these "fictions;" these other 24 jurisdictions have indulged in an "ignorance approach" (Appellee's Brief, P. 29); and in employing these fictions and their ignorance, these courts "bend over backwards to find a method to defeat coverage," (Appellee's Brief, P. 32-33). Apparently only McCall-Perez can see that the Emperor in this parade is really wearing no

clothes. That testimony is unworthy of belief.

From the outset, it is difficult to believe that McCall-Perez, who resides in and whose professional practice is in Miami, Florida, is the only mental health professional within 2,000 miles who can really see the light. His opinion was initially put before the Trial Court in a short Affidavit, talking only of intention. By the time of trial, that had come around to include expectation. At the risk of repetition, the following are other highlights of his testimony.

He is not familiar with the term "expectation." (T., P. 39, L. 1-16) He admitted an MMPI, one of the documents he used, is not directed to expectation of harm in a sexual contact situation. (T., P. 29, L. 17-19) He admitted an MMPI has no correlation to motivation

for sexual contact. (T., P. 32, L. 25 - P. 33, L.7) The MMPI was, of course, rather outdated, in that it was administered three to four years after the last sexual contact with the boys. (T., P. 33, L. 16) He admits there is no literature substantiating the idea that a perpetrator of sexual contact does not at least expect the consequences of his acts. (T., P. 40, L. 24) Although he has testified in a number of sexual contact cases, always for the victim (T. P. 35, L. 9), he admits he has never before testified on this issue. (T. P. 47, L. 7-12) In his experience as an expert witness, this was also the first time he had ever testified without interviewing either the victim and/or the perpetrator. (T., P. 35, L. 18) Despite his range of expertise and involvement, he has no opinion whether sexual contacts with

children, such as that engaged in by Bradley Purdy, should be criminal offenses. (T. P. 41, L. 13) This despite the fact that in his opinion, at least 90% of children exposed to sexual contacts such as these do suffer adverse affects. (T. P. 41, L. 14-21; T. P. 43, L. 10-13)

In addition to never having testified on this issue before, he admits he has never recommended to any legislative body that acts such as these should not be treated as criminal. (T. P. 47, L. 18-21) He is also unaware of any recognized body within the psychiatric or psychological field that has made any recommendation to a legislative body, to de-criminalize such conduct. (T. P. 47, L. 22 - T. P. 48, L. 5)

Then although he generally agreed that an expression of concern, phrased

exactly as Purdy did to one of the boys: "Are you okay," was evidence of some expectation of harm, (T. P. 51, L. 25) once it was pointed out to him that one of the boys specifically testified to such a fact, McCall-Perez still testified he found nothing that would lead him to conclude Purdy might have expected harm to be occurring. That testimony is unworthy of belief.

In the context of discussing McCall-Perez' opinions, and why he is the more credible expert, the Lerbacks argue that Dr. Michael McGrath, the expert called by American Family, actually makes their case. That simply isn't true. McGrath testified, more truthfully we believe, that he simply "could not get into someone's head," on the basis of review of an outdated MMPI, and other documents, to determine what someone was thinking four or five years

ago. He nonetheless pointed to several objective facts, which make all the sense in the world, that pointed to the conclusion that Purdy did expect the consequences of his acts. Those four facts are detailed at page 27 of our initial Brief, and are quickly repeated here, without further comment:

1) Purdy's own prior victimization;

2) His intelligence;

3) The number of sexual contacts with the Lerback boys; and

4) Protest of one of the boys.

Recently within our profession, there has developed increasing criticism of what has been referred to as "junk science," and "junk expert testimony." That criticism is directed at the idea that an expert can be found to advance any proposition whatsoever. Perhaps such criticism is too harsh in the

context of Dr. McCall-Perez' testimony. He does have legitimate credentials, and has given testimony a number of times on behalf of victims, albeit not on this issue. Perhaps his testimony does not fall within the realm of the "junk science" and "junk expert testimony" that is the subject of recent criticism. Nonetheless, the fact remains his testimony is unworthy of belief on the intent or expectation issue. As other courts have rejected such psychiatric testimony, so should this Court reject McCall-Perez' testimony.

Several cases have specifically rejected psychiatric testimony, such as that of McCall-Perez. In CNA Insurance Company v. McGinnis, 666 S.W.2d 689 (Ark. 1984), the Arkansas Supreme Court summarily rejected testimony by a clinical psychologist, who testified a perpetrator of sexual contact did not

intend any harm to his victims. In Rodriquez v. Williams, 729 P.2d 627 (Wash. 1986), the Washington Supreme Court likewise refused to consider the psychologist's Affidavit on the intent issue. In that case, the Trial Court ordered it stricken from the record, on the ground that it was conclusory and inadmissible. Finally, the most recently reported case to discuss this issue, J.C. Penney Casualty Insurance Company v. M.K., 804 P.2d 689 (Cal. 1991), also rejected psychiatric testimony, 804 P.2d at 700. The Court there stated "We note, however, that testimony, psychiatric or otherwise, that no harm was intended flies 'in the face of all reason, common sense, and experience.'" (Citations omitted.) This discussion was in the context of a discussion on intentional harm, not even the expectation issue. The California

Supreme Court apparently quotes with approval an earlier California case "characterizing such psychiatric testimony as 'inherently incredible,'" Id.

This Court should likewise dismiss the psychological testimony of McCall-Perez as "inherently incredible." It is difficult to understand how McCall-Perez can testify as he did, based only on a review of documents, one of which, an outdated MMPI, he admits is not even directed to issues involved in expectation or intent. The other documents he reviewed had even less to do with mental issues. Then in the face of Purdy's own testimony, along with the graphic detail of these repeated acts of sexual contact, it certainly flies in the face of all reason, to use the same phrase from another Court, to believe such injury was not at least expected.

South Dakota Pattern Jury Instruction 2.12 addresses the idea that even though one might be qualified as an expert, the finder of fact need not accept the testimony. That Instruction ends with the sentence "If you should conclude the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely." Here the reasons in support of McCall-Perez' opinions are not sound. His testimony should be rejected and disbelieved.

D. The common sense approach should not be rejected.

Appellees' Brief criticizes the "so-called 'common sense' arguments." (Appellees' Brief, P. 28-31) We will not devote a great deal of time or print to the issue. We continue to believe the other 24 jurisdictions have adopted

a reasonable, objective, common-sense approach and conclusion, in finding the injurious consequences of such acts are expected or intended by the perpetrator. As we frequently argue to juries, their common sense need not be left outside the jury room. Here that common sense approach should be applied, in the context of what is reasonable to expect from repeated acts of sexual molestation on young children.

In this regard, several other arguments should be addressed. In summarizing Bradley Purdy's testimony, Appellees' Brief at page 5 states "Purdy testified that the motivation that compelled him to fondle the Lerback children was his own overriding need to try to understand his own sexual molestation." It is difficult to comprehend how a deeper understanding could be gained, by repeatedly molesting

little boys. The next stated idea, that is that he "gave no thought to the consequences that could result" also seems to fly in the face of common sense, to again borrow that phrase from several of the decisions. Again referring to our detailed proposed Findings of Fact which were rejected by the Trial Court, but nonetheless which used word-for-word testimony from the Lerback boys, it is difficult to believe Purdy gave no thoughts to anything, in light of his telling the boys they had better not tell their parents, and other such threats, one of which was made after grabbing one of the boys by the back of his neck.

Sexual molestation of children is difficult to understand. We would probably concede that there is some degree of compulsive-impulsive conduct involved. Similar compulsive-impulsive

behavior probably exists in just about all criminal acts, particularly sexual acts. Taking the Lerbacks' arguments to their logical conclusion, should forcible rape be covered by a homeowner's policy? The obvious response to that argument is "Oh, that is much worse than this." But is it? Are the adverse consequences any less likely to occur. The answer is clearly no. Consequently, this argument on the compulsive-impulsive nature of the acts must fail.

The Lerbacks essentially argue that Purdy had no thoughts. (Appellee's Brief, P. 16-17) Common sense dictates otherwise. Purdy himself testified otherwise. Following each act of sexual contact with the Lerback boys, Purdy thought about it. (Purdy deposition, P. 82, L. 7) Following each act of sexual contact with the boys, Purdy told

himself he wouldn't do it again. (Purdy, P. 82, L. 9) Following each act of sexual contact with the boys, Purdy told himself he shouldn't do it again. (Purdy, P. 82, L. 11) Purdy recognized no good could result from the sexual contacts with the Lerback boys, either for himself or for the boys. (Purdy, P. 82, L. 15)

Furthermore, the assertion is likewise inconsistent with our proposed Findings 16-41, which need not be set forth in detail again. Again, the graphic testimony of the Lerback boys in describing the acts tells far more than the "Gee, I just didn't think" argument, which Appellees' Brief now urges.

APPENDIX 3

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

FINDINGS OF FACT AND CONCLUSIONS OF LAW

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

This action having come on for trial before the Court sitting without a jury at the Pennington County Courthouse, Rapid City, South Dakota, at 9:00 o'clock a.m. on January 25, 1991; and

Plaintiff having appeared by its counsel Douglas M. Deibert of Cadwell, Sanford & Deibert, Sioux Falls, South Dakota; Defendant Bradley Purdy having appeared by his attorney, Rodney Schlauger of Bangs, McCullen, Butler, Foye & Simmons, of Rapid City, South Dakota; and Defendants David Lerback and Jani Lerback having appeared by their counsel, Donald P. Knudsen of Gunderson, Palmer, Goodsell & Nelson, of Rapid City, South Dakota; and

The Court having heard the testimony of the witnesses, and having considered the testimony, exhibits and other evidence offered at trial, including the trial testimony of Christian Lerback and Andrew Lerback given in related proceedings, and the deposition testimony of Bradley Purdy, and having considered the arguments of counsel, and being in all things

advised,

The Court now makes the following:

FINDINGS OF FACT

1. At all times material between 1982 and 1986, Bradley A. Purdy (hereinafter Purdy) resided with his parents, Richard and Carolyn Purdy, in Rapid City, South Dakota.

2. Purdy's birth date is February 8, 1964.

3. Between 1982 and 1986, Richard and Carolyn Purdy carried homeowner's liability insurance coverage with Plaintiff American Family Mutual Insurance Company, according to the terms and conditions of the policy forms that comprise Trial Exhibits 1 and 2.

4. Said policies excluded from liability coverage damages or injuries relating from acts of an insured that were expected or intended by any

insured.

5. Purdy was an insured under the policies in effect from 1982 to 1986.

6. At all times material between 1982 and 1986, the Purdy family members were friends of the David and Jani Lerback family.

7. On numerous occasions between 1982 and 1986, Purdy was in the company of the Lerback children, Christian Lerback (hereinafter Christian), whose birth date is September 21, 1972; and Andrew Lerback (hereinafter Andrew), whose birth date is December 27, 1978.

8. Purdy would on occasion babysit Andrew and Christian, and either in the babysitting context or other situations, was on numerous occasions with the Lerback children in the absence of the Lerback parents.

9. On approximately 15 occasions between 1982 and 1986, Purdy had sexual

contact with Andrew.

10. The first act of sexual contact with Andrew involved Purdy's closing the door of a room, sitting with his back to the door, with Andrew seated between Purdy's legs, during which time Purdy undid Andrew's pants and rubbed Andrew's penis for about 10 minutes.

11. Immediately following this initial incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No."

12. Immediately following this initial incident of sexual contact with Andrew, Purdy told Andrew he had better not tell his parents.

13. Several weeks after the first incident of sexual contact with Andrew, while in a car in the Safeway parking lot in Rapid City, South Dakota, Purdy undid Andrew's pants and again rubbed Andrew's penis for about 10 minutes.

14. Immediately following the second incident of sexual contact in the Safeway parking lot, Purdy asked Andrew if it felt good, to which Andrew again replied "No."

15. Immediately following this second incident of sexual contact with Andrew, Purdy asked Andrew if he was going to tell his parents, to which Andrew replied "No."

16. On a later occasion, Purdy followed Andrew to Andrew's bedroom, Purdy shut the door, sat on the floor with his (Purdy's) back to the door, sat with his legs spread apart, and told Andrew to undo his (Andrew's) pants and sit between Purdy's legs again.

17. On this third described incident of sexual contact, Purdy rubbed Andrew's penis for about 10 minutes again.

18. Immediately following this

third described incident of sexual contact, Purdy asked Andrew if it felt good, to which Andrew replied "No, it doesn't."

19. During the times the sexual contact with Andrew was going on, the acts occurred on approximately a weekly basis.

20. On a fourth described incident of sexual contact with Andrew, Purdy took Andrew into Christian's room, closed the door, sat up against the door with his legs spread apart, and told Andrew to undo his (Andrew's) pants and sit between Purdy's legs again.

21. On this fourth described incident of sexual contact, Purdy again rubbed Andrew's penis for about 10 minutes.

22. Immediately following this fourth described incident of sexual contact, Purdy asked Andrew if it felt

good, to which Andrew replied "No."

23. Immediately following this fourth described incident of sexual contact, Purdy and Andrew heard Christian coming downstairs to the room, and they also heard Mrs. Lerback pulling into the driveway.

24. Immediately following this fourth described incident of sexual contact with Andrew, and after hearing other members of the Lerback family arriving, Purdy grabbed the collar of Andrew's neck, pulled him back around, and said "You better not tell your parents."

25. Purdy had other incidents of sexual contact with Andrew, totalling approximately 15, but details of these other contacts were not described by Andrew.

26. Purdy had at least three incidents of sexual contact with

Christian.

27. On the first incident of sexual contact with Christian, Purdy took Christian to an upstairs bedroom and stood up on the bed.

28. Purdy then asked Christian if he trusted him (Purdy), to which Christian said yes.

29. Purdy then told Christian to take down his pants, and that if Christian trusted Purdy, he would do it.

30. Christian took down his pants, and Purdy rubbed Christian's penis for approximately five minutes.

31. Following the first incident of sexual contact with Christian, after telling Christian he could put his pants back on, Purdy let Christian pick out a coin from Purdy's coin collection, as a reward for Christian's participation in the act.

32. Following the first incident of sexual contact with Christian, Purdy told Christian "If you trust me, you won't tell your parents."

33. On the second described incident of sexual contact with Christian, Purdy took Christian to a bedroom, laid Christian on the bed, told Christian to take off his swimming shorts, and gave Christian a copy of Playboy Magazine.

34. This second described incident of sexual contact took place during the summer of 1982, prior to Christian's 9th birthday. 35. During the second described incident of sexual contact with Christian, Purdy masturbated Christian.

36. Immediately following this second described incident of sexual contact with Christian during the summer of 1982, Purdy asked Christian if he was

okay, to which Christian replied "Yes."

37. The third incident of sexual contact with Christian, occurred during the summer of 1983.

38. On the third described incident of sexual contact with Christian, after some other boys had left, Purdy took Christian to a room, locked the door, stood Christian up on a chair, and told Christian to pull down his (Christian's) shorts.

39. On this third incident of sexual contact with Christian, Purdy began rubbing Christian's penis, and told Christian to go ahead and let it get hard.

40. Christian responded "No" to Purdy's direction to "Let it get hard."

41. On this third described incident of sexual contact with Christian, Purdy then told Christian "Do it for me," to which Christian refused.

42. Both Christian and Andrew described feelings of fear and confusion over the sexual contacts initiated by Purdy.

43. David Lerback and Jani Lerback have instituted a civil action against Bradley Purdy, seeking damages in their own right and on behalf of their minor children Christian and Andrew, in which they allege entitlement to damages against Purdy which have allegedly resulted from the sexual contacts with Christian and Andrew. Said case is filed with the Pennington County Clerk of Courts as Case No. 88-903.

44. Purdy had been a victim of sexual contact himself, when he had been a young boy.

45. Purdy grew up in a home with good parents, with whom he could openly discuss sexual matters.

46. Because of the shame, guilt,

fear and embarrassment caused by his own victimization, Purdy was never able to discuss with his parents his own prior victimization, until after his arrest for the acts of sexual contact with the Lerback boys.

47. Purdy was charged criminally for acts of sexual contact with the Lerback boys, for which he was convicted and sentenced.

48. The acts of sexual contact with Andrew and Christian occurred following Purdy's graduation from high school.

49. Purdy graduated from high school in 1982 with honors, with approximately a 3.4 grade point average.

50. According to Purdy, the acts of sexual contact with the Lerback boys occurred following his first year of college at Brigham Young University.

51. During his freshman year at

Brigham Young University, Purdy had a grade point average in the 3.2 - 3.3 range.

52. Purdy's prior sexual victimization occurred when he was 10 to 11 years old, involved another male approximately 16 years old, and involved 5 to 10 incidents over a four to five month period.

53. Following his own victimization, the incidents had been on Purdy's mind a great deal.

54. Purdy's prior victimization caused him considerable mental pain over the years.

55. Purdy's prior victimization caused him guilt.

56. Purdy's prior victimization caused him considerable fear over the years.

57. Purdy's prior victimization caused him shame and embarrassment.

58. When initiating sexual contact with Andrew and Christian, Purdy had thought about his own prior victimization.

59. Following each incident of sexual contact with the Lerback boys, Purdy thought about it.

60. Following each act of sexual contact with the Lerback boys, Purdy told himself he wouldn't do it again.

61. Following each act of sexual contact with the Lerback boys, Purdy told himself he shouldn't do it again.

62. Purdy recognized no good could result from the sexual contacts with the Lerback boys, either for himself or for the boys.

63. During the time Purdy was engaging in sexual contacts with the Lerback boys, he gave no thought to the fact that he might be an insured under his parents' homeowner's policy.

64. In at least 90% of the cases, adverse or injurious consequences will result to the child victim of sexual contacts.

65. Based on the nature of sexual contact involved, there is an inference of intent to injure.

66. Bradley Purdy expected or intended injury or adverse consequences to result to Christian and Andrew Lerback, as the result of his sexual contacts with them.

Upon the foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. An intent to injure, or expectation of harm or injury will be inferred from the nature of the acts of sexual contact initiated by Bradley

Purdy upon Andrew and Christian Lerback.

3. Bradley Purdy expected injury or adverse consequences to result to Andrew and Christian Lerback, as the result of Purdy's sexual contacts with the boys.

4. The exclusionary language of the applicable insurance policies upon which Bradley Purdy is an insured precludes coverage for any damages or injuries inflicted by Bradley Purdy upon Andrew and Christian Lerback, as the result of the acts of sexual contact.

5. Plaintiff American Family Mutual Insurance Company is not obligated to defend Bradley Purdy in the action brought by the Lerbacks against Bradley Purdy, nor is Plaintiff American Family Mutual Insurance Company obligated to indemnify Bradley A. Purdy for any amounts that may be adjudged against Bradley Purdy in said legal

action.

Dated this _____ day of February, 1991.

BY THE COURT:

JEFF W. DAVIS
Circuit Court Judge

ATTEST:

_____
Clerk of Courts

By _____
Deputy

(SEAL)

APPENDIX 4

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

INDEX TO
PROPOSED FINDINGS OF FACT

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AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

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For the convenience of the Court and counsel, the following references to various transcripts are made, matching proposed Findings of Fact with previously given testimony.

FINDING	REFERENCE
2	Bradley Purdy deposition, p.53
9	Andrew Lerback Trial Transcript, Page 8, Line 15
10-12	Andrew Lerback Trial Transcript, Page 4
13-15	Andrew Lerback Trial Transcript, pages 5-6
16-18	Andrew Lerback Trial Transcript, pages 6-7
19	Andrew Lerback Trial Transcript, Page 8, Line 18
20-24	Andrew Lerback Trial Transcript, Page 8-10
25	Andrew Lerback Trial Transcript, Page 8, Line 15
26	Christian Lerback Trial Testimony, Pages 6-10
27-32	Christian Lerback Trial Testimony, Page 6
33-36	Christian Lerback Trial Testimony, Pages 7-8
37-41	Christian Lerback Trial Testimony, Page 10
44	Purdy Deposition, Page 37
45	Purdy Deposition, Page 60
46	Purdy Deposition, Page 60, Line 23; Page 61, Line 7
47	Purdy Deposition, Page 48

48	Purdy Deposition, Page 54, Line 22
49	Purdy Deposition, Page 55, Lines 3-4
50	Purdy Deposition, Page 54, Line 25
51	Purdy Deposition, Page 55, Lines 12-13
52	Purdy Deposition, Page 55, Line 21 through Page 56, Line 7
53	Purdy Deposition, Page 57, Line 5
54	Purdy Deposition, Page 57, Line 8
55	Purdy Deposition, Page 38, Line 11; Page 57, Line 10; Page 60, Line 1
56	Purdy Deposition, Page 59, Line 21
57	Purdy Deposition, Page 60, Lines 3, 5-7
58	Purdy Deposition, Page 61, Line 11
59	Purdy Deposition, Page 82, Line 7
60	Purdy Deposition, Page 82, Line 9
61	Purdy Deposition, Page 82, Line 11

62 Purdy Deposition, Page 82, Line 15

63 Purdy Deposition, Page 53, Lines 13, 18

64 Trial Testimony of Dr. Fred McCall-Perez; Deposition Testimony of McCall-Perez, Page 35

Dated at Sioux Falls, South Dakota, this _____ day of February, 1991.

CADWELL, SANFORD & DEIBERT

By _____
Douglas M. Deibert
120 North Phillips Avenue
P.O. Box 1157
Sioux Falls, South Dakota 57101

II.

That at all times material hereto the defendant, Bradley Alan Purdy, approximately twenty-three (23) years of age, resided with his parents, defendants Richard and Carolyn Purdy, at 3508 Cypress Court, Rapid City, Pennington County, South Dakota.

III.

That intermittently throughout the years 1982 through 1985, the minor plaintiffs were left in the care of the defendants at either the plaintiffs' residence or the defendants' residence, and the defendants assumed the care and supervision of the minor plaintiffs.

IV.

That it was the duty of the defendants to use due and reasonable care supervising and safeguarding the minor plaintiffs.

FIRST CAUSE OF ACTION

V.

Plaintiffs adopt by reference Paragraphs I through IV.

VI.

That on or about the aforementioned time periods, while the minor plaintiffs were placed in the care of the defendants, defendant Bradley Alan Purdy neglected and failed to use due and reasonable care in the supervision and care of the minor plaintiffs in that the defendant, negligently and without the intent to harm, touched and fondled the minor plaintiffs' persons in an indecent manner.